23

DOCKET FILE COPY ORIGINAL

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

April 12, 1999

RECEIVED
APR 12 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

Re: Inter-Carrier Compensation for ISP-Bound Traffic
Comments of Time Warner Telecom in CC Docket No. 99-68

Dear Ms. Salas:

Enclosed please find an original and four copies of the Time Warner Telecom comments as well as a disk containing an electronic version of the comments in the above-referenced proceeding. A disk copy is also being filed with ITS.

Sincerely,

Carmen D. Minor

Carmen D. Minor

Enclosures

No. of Copies rec'd 0+4
List ABCDE

Washington, DC
New York
Paris
London

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

RECEIVED

APR 12 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)
	)
Inter-Carrier Compensation for ISP-Bound Traffic	) CC Docket No. 99-68
	)

COMMENTS OF TIME WARNER TELECOM

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS
INC. d/b/a TIME WARNER TELECOM

April 12, 1999

TABLE OF CONTENTS

PAGE

INTRODUCTION AND SUMMARY i

I. SECTION 202(a) REQUIRES THAT CARRIERS TREAT THE EXCHANGE OF ISP-BOUND TRAFFIC BETWEEN LECS AS IF IT WERE THE EXCHANGE OF SECTION 251(b)(5) TRAFFIC. 1

A. The Exchange Of ISP-Bound Traffic And The Exchange Of Traffic Subject To Section 251(b)(5) Are "Like" Services And Therefore, Under Section 202(a), There Must Be A Just And Reasonable Basis For Allowing ILECs To Treat Them Differently. 3

B. There Is No Just And Reasonable Basis For Allowing ILECs To Discriminate Between The Exchange Of Traffic Subject To Section 251(b)(5) And ISP-Bound Traffic. 8

II. AT THE VERY LEAST, ISP-BOUND TRAFFIC MUST CONTINUE TO BE PART OF THE SECTION 251-252 INTERCONNECTION AGREEMENT NEGOTIATION AND STATE REVIEW PROCESS. 15

III. THE COSTS AND REVENUES ASSOCIATED WITH SERVING ISPS SHOULD CONTINUE TO BE CLASSIFIED AS INTRASTATE FOR SEPARATIONS PURPOSES. 17

CONCLUSION 17

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)
	)
Inter-Carrier Compensation for	) CC Docket No. 99-68
ISP-Bound Traffic	)

COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Inc. d/b/a Time Warner Telecom ("TWTC"), by its attorneys, hereby files these comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

TWTC continues to believe that the FCC incorrectly concluded in its Declaratory Ruling in CC Docket No. 96-98 that Section 251(b)(5), by its terms, does not apply to the exchange of ISP-bound traffic. One of the most egregious oversights of that decision was that the FCC chose not even to address the argument raised by many parties, including TWTC, that the ILECs' refusal to pay reciprocal compensation on ISP-bound traffic violated the prohibition against unreasonable discrimination in Section 202(a) of the Communications Act.

At the very least, the Commission must not neglect to apply the bedrock principles of Section 202(a) to the exchange of ISP-

---

1 See Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Notice of Proposed Rulemaking* (rel. Feb. 26, 1999).

bound traffic on a going-forward basis. That provision prohibits carriers from discriminating where providing "like" services unless doing so is just and reasonable. There can be no question that the exchange of traffic subject to Section 251(b)(5) and ISP-bound traffic are "like" services. There is also no basis in policy for treating these services differently. The Commission should therefore exercise its authority under the Communications Act to establish a federal policy that the federal and state rules as well as any interconnection agreement provisions applicable to the exchange of Section 251(b)(5) traffic also apply to the exchange of dial-up traffic between an end user ISP subscriber and an ISP (also an end user) in the same local calling area ("ISP-bound traffic").

Even if the FCC were to refuse to take this action, the FCC must at least adopt its tentative conclusion that the exchange of ISP-bound traffic should be part of the broader Section 251-252 interconnection agreement negotiation and arbitration process. The states are far better suited to handling this issue than the FCC.

Finally, as long as the FCC keeps the exchange of ISP-bound traffic as part of the Section 252 process, no new federal charges will be created for the exchange of ISP traffic. There is therefore no need to change the practice of allocating costs and revenues associated with ISP-bound traffic to the intrastate rate base for the purposes of separations.

I. SECTION 202(a) REQUIRES THAT CARRIERS TREAT THE EXCHANGE OF ISP-BOUND TRAFFIC BETWEEN LECS AS IF IT WERE THE EXCHANGE OF SECTION 251(b)(5) TRAFFIC.

TWTC continues to believe that Section 251(b)(5), 47 U.S.C. § 251(b)(5), should be construed to require the payment of reciprocal compensation for the transport and delivery of ISP-bound dial-up traffic.[2]

However, even assuming arguendo that such traffic does not fall within the scope of the reciprocal compensation provisions adopted in the Telecommunications Act of 1996, Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), mandates application of the reciprocal compensation rules adopted pursuant to the 1996 Act to ISP-bound traffic as well. Thus, ISP-bound traffic must be treated as if it were traffic subject to Section 251(b)(5). Both kinds of traffic should be considered subject to whatever reciprocal compensation rates, terms and conditions the carriers agree to in interconnection negotiations or that the state commissions mandate pursuant to arbitration or generic rulemakings. Any appeals from state decisions would lie in federal district court. See 47 U.S.C. § 252(e)(6).

As the discussion below demonstrates, adoption of a federal regulatory scheme which allows ILECs to pay a different exchange rate for ISP-bound traffic and traffic subject to Section 251(b)(5) would effectively sanction precisely the sort of

---

2 See Reply Comments of Time Warner Communications Holdings, Inc., In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30 (filed July 31, 1997).

"unjust and unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" which Section 202(a) was designed to prevent. In order to properly fulfill its statutory duty to "execute and enforce" the provisions of the Communications Act, including Section 202(a), the Commission must take action in this proceeding to eliminate the unlawful, discriminatory practices which a number of ILECs have already adopted, in refusing to pay reciprocal compensation for ISP-bound calls, and to prevent the adoption of such practices by other carriers.

As the Commission's prior decisions recognize, "applicable judicial decisions establish a three-prong test for determining whether a Section 202(a) violation has occurred."[3] In the first stage of the analysis, the Commission must "determine whether the services at issue are like one another." Id. Next, the Commission must "determine whether there is disparate pricing or treatment between the like services." Id. Finally, "if disparate pricing or treatment is found to exist, the Commission must decide whether the disparity is justified and, therefore, not unreasonable." Id. In this regard, the burden is on the carrier whose practices are at issue to demonstrate that the discrimination is not "unjust or unreasonable." Id.[4]

---

3 Mid-Missouri Substance v. United Telephone Co. of Missouri, 8 CR 1284, 1291 (C.C.B. 1997) [Mid-Missouri], citing Competition in the Interstate Interchange Marketplace, 6 FCC Rcd 5880, 5903 (1991); MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) ("MCI v. FCC").

4 See also MCI. v. FCC, 917 F.2d at 39; American Broadcasting Company v. FCC, 663 F.2d 133, 139 (D.C. Cir. 1980).

A. The Exchange Of ISP-Bound Traffic And The Exchange Of Traffic Subject To Section 251(b)(5) Are "Like" Services And Therefore, Under Section 202(a), There Must Be A Just And Reasonable Basis For Allowing ILECs To Treat Them Differently.

In making determinations as to "likeness," the courts have found that a "functional equivalency" test is to be employed, which "focuses on whether the services in question are 'different in any material functional respect.'"[5] In this instance, as TWTC previously observed in its October 30, 1998 ex parte submission in this proceeding, LECs "perform the same functions when exchanging local voice traffic as when they exchange ISP traffic over circuit-switched, dial-up connections."[6] Moreover, the local business services purchased by ISPs, in order to connect with their subscribers within a particular local calling area, are not only functionally indistinguishable from the jointly-provided local services obtained by other businesses, as to which the ILECs pay reciprocal compensation, they are in fact purchased under the very same local business tariffs.

This latter fact is, of course, no accident. As Commissioner Ness has observed "[s]ince 1983, the Commission has consistently and consciously permitted enhanced service providers

---

5 Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795 (D.C. Cir. 1982), quoting American Trucking Association v. FCC, 377 F.2d 121, 127 (D.C. Cir. 1996), cert. denied, 386 U.S. 943 (1967).

6 See Attachment ex parte to Letter from Thomas Jones to Ms. Magalie Roman Salas, Secretary, Federal Communications, Commission filed in CC Docket Nos. 96-98; 98-79; 98-103; 98-161; 98-168; CCB/CPD Docket No. 97-30 (October 30, 1998) at 4 [emphasis added].

[ESPs], a category that now includes [ISPs], to connect to their customers using local business lines."[7] In this regard, the Commission "has directed states to treat ISP traffic as if it were local by permitting ISPs to purchase their PSTN links through local business tariffs."[8] Moreover, throughout this period, the Commission has "consistently and consciously" treated ESPs/ISPs as end users for purposes of the Commission's access charge regime[9] and universal service rules,[10] as well as in determining the eligibility (or, more properly, the ineligibility) of ISPs to request interconnection or unbundled access pursuant to Sections 251(c)(1) and (c)(2) of the Communications Act.[11] In addition, as the Commission has observed, consistent with the established federal policy of treating ESPs/ISPs as end users and allowing them to purchase needed services through local business line service tariffs filed

---

7 Separate Statement of Commissioner Ness (February 25, 1999) at 1; also see Declaratory Ruling at ¶ 5, n.11.

8 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Declaratory Ruling*, ¶ 9 (rel. Feb. 26, 1999) ("Declaratory Ruling").

9 See 47 C.F.R. § 69.2(m); In the Matter of MTS and WATS Market Structure, *Memorandum Opinion and Order,* 97 FCC 2d 682, 715, ¶ 83 ("MTS/WATS Market Structure").

10 See Federal-State Joint Board on Universal Service, *Report and Order,* 12 FCC Rcd 8776, ¶ 788-790 (1997).

11 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd 15499, ¶ 995 (1996) ("we conclude that enhanced service providers that do not also provide domestic or international telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under section 251").

with the states, "incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes." Declaratory Ruling, ¶ 5. The treatment of ISPs as end users was recently reaffirmed by the Commission, in its 1997 Access Charge Reform Order.[12] In affirming the Commission's order, the U.S. Court of Appeals for the Eighth Circuit rejected ILEC claims that the decision to continue to treat ISPs in the same manner as other end users constituted unlawful discrimination in favor of ISPs, in violation of Section 202(a).[13]

In its Declaratory Ruling, the Commission acknowledged that "our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." Declaratory Ruling, ¶ 25. TWTC submits that the Commission's long-standing policy of treating all ESPs, including ISPs, as end users under Title II of the Communications Act, reflects a recognition that ISPs are in fact appropriately classified and treated for regulatory purposes in the same manner as other end users. To adopt a rule which permits or requires ILECs to adopt a compensation scheme for the exchange of ISP-bound traffic which differs from that applicable

---

12 In the Matter of Access Charge Reform, *First Report and Order*, 12 FCC Rcd 15982, 16933-34 (1997) ("Access Charge Reform Order").

13 Southwestern Bell Telephone v. FCC, 153 F.3d 523, 542 (8th Cir. 1998).

to the exchange of traffic delivered to other end users in a functionally identical manner, pursuant to the same tariffed local business service offerings, would be patently discriminatory in several respects.

First, adoption of a rule or policy which enables ILECs to refuse to pay reciprocal compensation for the delivery of ISP-bound traffic, or to compensate at a rate lower than that established for other end user traffic delivered in the same manner, would result in direct discrimination against CLECs serving ISPs. If tolerated, such practices also would result in indirect discrimination against the ISPs themselves, who are likely to face price increases and/or reductions in their service provider options arising from the ILECs' discriminatory reciprocal compensation practices. In addition, as ALTS previously has observed, yet another form of discrimination arises to the extent ILECs are permitted to continue to maintain exchange of traffic arrangements with adjacent ILECs which do not differentiate between ISP-bound traffic and traffic delivered to other end users within a local calling area, while at the same time denying reciprocal compensation for ISP-bound traffic delivered by CLECs.[14]

In each instance, CLECs serving ISPs and the ISPs themselves are singled out for disparate treatment, notwithstanding the fact that the services which they provide (in the case of the CLEC)

---

[14] See ALTS Request for Expedited Letter Clarification, CC Docket No. 96-98 (filed June 20, 1997) at 7.

and receive (in the case of the ISP) plainly meet the "functionally equivalent" test of Section 202(a). The Commission previously has determined that it is unlawful under Section 202(a) for a carrier to discriminate solely on the basis that the affected party is a "potential competitor" or "is not the ultimate end user of the service."[15] In addition, the Commission has taken action to prevent discrimination in state tariffs against customers that interconnect local businesses to interstate private line network facilities "by reason of their status as interstate customers."[16] Adoption of a policy which permits ILECs to exclude the exchange of ISP-bound traffic from reciprocal compensation arrangements applicable to exchanges of traffic in connection with the provision of identical services to other business users targets ISPs and their CLEC service providers for discriminatory treatment which is wholly-inconsistent with these precedents and with the existing federal regulatory framework, under which ISPs are treated in the same manner as other end users.

---

15 In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, *Report and Order,* 60 FCC 2d 261, 286 (1976), recons. 62 FCC 2d 588 (1977), aff'd sub nom. AT&T v. FCC, 572 F.2d 17 (2nd Cir. 1978), cert. denied, 439 U.S. 875 (1978); Resale and Shared Use, 83 FCC 2d 167, 173 (1980); Telpak Sharing, 23 FCC 2d 606, 612 (1970).

16 New York Telephone Company, 76 FCC 2d 349, 354 (1980), aff'd sub nom.; New York Telephone Company v. FCC, 631 F.2d 1059 (2d Cir. 1980).

B. There Is No Just And Reasonable Basis For Allowing ILECs To Discriminate Between The Exchange Of Traffic Subject To Section 251(b)(5) And ISP-Bound Traffic.

There is simply no valid justification of any sort for applying different compensation rules to the exchange of ISP-bound traffic, whereas there are a number of compelling reasons why it is important for the Commission to ensure that the reciprocal compensation rules and interconnection agreement provisions developed pursuant to Section 251(b)(5) of the 1996 Act are applied on a non-discriminatory basis to such traffic, consistent with the requirements of Section 202(a).

The NPRM proceeds from the sound premise that LECs incur costs for transporting and delivering traffic and that they should be able to recover those costs. See NPRM, ¶ 29. The NPRM is thus consistent with the policies of Section 252 and the Communications Act more generally in favor of cost-based prices.[17] This preference for cost-based rates is based on the conviction that efficient market outcomes are more likely in the presence of accurate pricing signals.

Section 252(d)(2) requires that current reciprocal compensation rates be based on an estimation of the "additional costs" (interpreted by the FCC as the costs of an efficient provider of the service) of terminating calls subject to Section 251(b)(5). 47 U.S.C. § 252(d)(2)(A)(ii). The FCC's rules further require that the rate structure for transport and

---

17 See Access Charge Reform Order, ¶¶ 36-52 (describing the importance of cost-based rates for competition and outlining reforms designed to ensure cost-based access charges).

termination accurately reflect the manner in which LECs incur costs when transporting and delivering traffic. See 47 C.F.R. §§ 51.709, 51.711.

As mentioned, all LECs perform the same functions when transporting and delivering calls to ISP end users as they do when transporting and delivering calls to other end users. When LECs perform the same functions, they incur the same costs. It follows that rules governing the exchange of traffic subject to Section 251(b)(5) should apply to the exchange of ISP-bound traffic. Given that the Commission has concluded that those rules ensure reliable pricing signals for the exchange of traffic subject to Section 251(b)(5), it must also conclude that they perform precisely the same function for the exchange of ISP-bound traffic.[18] Efficient outcomes are therefore more likely if the exchange of ISP-bound traffic is governed by the requirements of Section 252(d)(2) and the FCC's implementing rules.[19]

---

18 It is Time Warner Telecom's understanding that the traffic studies that at least some states have relied upon for setting rates under Section 251(b)(5) incorporated ISP-bound traffic. This further supports the conclusion that current Section 251(b)(5) reciprocal compensation rates should apply to all traffic exchanged between end users (including ISPs) within the same calling area.

19 This means, for example, that a state may not require bill and keep where doing so would prevent the application of cost-based rates. Thus, Section 51.713(b) of the Commission's rules permits bill and keep only where the traffic between two carriers is "roughly balanced." See 47 C.F.R. § 51.713(b). In determining whether traffic is "roughly balanced" under this rule, states should be required to consider both the Section 251(b)(5) traffic and the ISP-bound traffic.

The ILECs' objection to paying cost-based exchange rates for ISP-bound traffic is actually not ultimately based on these principles but upon other aspects of the regulatory structure. For example, ILECs complain that they are unable to receive compensation from their originating end user subscribers for the costs of terminating those subscribers' dial-up traffic to ISPs served by CLECs. This is because those subscribers sometimes pay relatively low, flat local service charges.[20] It is of course far from clear that the ILECs' second line revenues for data connections and, in states where it is permitted, local measured service charges do not cover the cost of terminating traffic to ISPs.[21] Even assuming there is some basis for the ILECs' claim, however, the shortfall the ILECs purportedly experience is not caused by the rate set for the exchange of traffic with other

---

20 See Bell Atlantic Motion For Expedition, filed in Bell Atlantic Tel. Cos. et al. v. FCC, D.C. Cir. No. 99-1094 (consolidated with Nos. 99-1095, 99-1097, & 99-1106) at 11 (Bell Atlantic explains that "[b]ecause of long-established state policies that require incumbent carriers to provide basic local service at affordable rates, incumbents typically collect from residential end-user customers a flat payment of less than $20 each month for basic local service." As a result, Bell Atlantic claims that, "[i]f an incumbent must pay reciprocal compensation for a subscriber's Internet-bound calls, the result is an enormous windfall for the competing carrier that serves the subscriber's ISP and an equally enormous loss to the incumbent").

21 See e.g. Comments of Juno Online Services, CC Docket No. 96-263 (filed March 24, 1997) at 9 (explaining that "local telephone usage by ESPs, even if it imposes additional or unusual costs on the LECs, is also accompanied by *increased* revenues to LECs from second lines and ISDN service") (emphasis in original); Comments of Internet User Coalition, CC Docket No. 96-263 (filed March 24, 1997) at 32-34 (describing substantial ILEC second line revenues).

LECs. The real problem is with local service rates that are purportedly not based on cost. But it is beyond the scope of this proceeding as well as the FCC's jurisdiction to attempt to change local rates paid by ILEC subscribers to cover the costs of dial-up ISP connections. Moreover, it would only compound the problem to set reciprocal compensation rates at some non-cost based level to compensate for the shortcomings of the local rate structure. It is simply absurd to argue that the exchange of ISP-bound traffic should not be based on cost simply because the states have not yet adjusted their local service rate structures to reflect the cost of providing local service and competition more generally.

Of course, this is exactly what Ameritech proposes when it argues that the rate for the exchange of ISP-bound traffic be based on a split of the revenue incumbent LECs receive from the end users that originate the ISP-bound traffic.[22] Ameritech essentially asks that the exchange rate for ISP-bound traffic be determined by how much the ILEC makes from its end user customer who originates the dial-up connection to an ISP. But there is no more arbitrary basis for setting a rate for transporting and delivering traffic than to base it upon the rate for another service with different cost characteristics (and which in any case may not be based on cost).[23]

---

22 See NPRM ¶ 33 citing Letter from Gary Phillips, Director of Legal Affairs, Ameritech, Inc., to Magalie R. Salas, Secretary, FCC (July 17, 1998).

23 Some ILECs will probably assert that competitive LECs should simply recover their costs from the ISPs themselves in the

In any case, even if the Commission were to try to single out ISP-bound traffic for different exchange rate treatment, it would need to explain why traffic to similarly situated end users should not also be excluded from the Section 251(b)(5) requirements. The comments submitted in this proceeding and in response to the Commission's Access Charge NOI, the Commission's own prior orders, and various state commission rulings indicate that there is no way to impose differential treatment on ISPs or their carriers based upon the jurisdictional nature or volume of traffic delivered to the ISPs, since there are other non-ISP customers who utilize their own local business lines in a similar manner. In this regard, in its initial order exempting ESPs and other end users from the payment of certain interstate access charges imposed on carriers, the Commission identified various types of non-ESP users who "employ exchange service for jurisdictionally interstate communications," including private network operators, sharers and other private line and WATS

---

form of higher local service rates to businesses. But TWTC's business service rates abide by the same convention as virtually all rates charged to telecommunications end users in that TWTC does not charge business end users for the incremental cost of receiving traffic. Rather, TWTC requires parties to pay only for calls they originate (either through a flat rate that reflects average originating usage or through a per-minute rate for calls originated by the customer). This is more efficient than requiring called parties to pay for the traffic they receive because originating parties can respond to pricing signals while call recipients cannot. Thus, requiring ISPs to pay for traffic they receive would only introduce an unnecessary inefficiency.

customers.[24] With regard to the volume of incoming traffic delivered to ISPs, commenting parties have observed that a number of other categories of ESP and non-ESP business end users generate similar traffic patterns.[25] Similarly, in ruling that reciprocal compensation applies to ISP-bound traffic, the New York Public Service Commission noted that "a call to an ISP is no different than a call to any other large volume customer, such as a local bank or a radio call-in program."[26] Indeed, in its 1997 Access Charge Reform Order, the Commission itself acknowledged that "many of the characteristics of ISP traffic (such as large

---

24 MTS/WATS Market Structure, 97 FCC 2d at 711, 715. See also Comments of Internet User Coalition, CC Docket No, 96-263 (filed March 24, 1997) at 28 ("Many end users pass traffic on to data networks, including bank-by-phone lines, credit verification networks, and ticket purchasing agencies").

25 See e.g. Comments of America Online, Inc., CCB/CPI 97-30 (filed July 17, 1997) at 12 (noting that "concert tickets and other ticketing agencies, credit card services, airline reservation services, catalog merchants, banks or other financial institutions, and call-in radio can also induce large amounts of inbound local telephone traffic"); Comments of Juno Online Services, CC Docket No, 96-263 (filed March 24, 1997) at 8 ("the capabilities provided by the LEC to the ESP and the demand placed on the local telephone network switch by the ESP are comparable to the services and demands placed on the switch by other types of business users. Indeed, although the principal LEC argument for access charges is that ESPs use flat-rated local telephone services predominantly to receive calls, there are a variety of business line users -- including ticketing agencies, credit card validation services, airline reservation services, catalog merchants and the like -- whose 'inbound' usage of the local telephone network is similar to ESPs'")(citations omitted).

26 Order Closing Proceeding, Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, New York PSC Case 97-C-1275 (March 19, 1998) at 3.

numbers of incoming calls to Internet service providers) may be shared by other classes of business customers."[27]

Finally, it is important to emphasize the consequences for the marketplace of failing to apply the Section 251(b)(5) rules to the exchange of ISP-bound traffic. As they have demonstrated, the ILECs will use any excuse to delay paying CLECs for the cost of transporting and delivering this traffic. If the FCC rules that the carriers themselves must negotiate the terms of exchanging ISP-bound traffic, the ILECs will drag those negotiations out as long as possible and will appeal any state decision resolving disputes. The ILECs will also refuse, if at all possible, to pay any compensation while their appeals of state decisions are pending. The result is obviously exactly what the ILECs have been after throughout this proceeding: the barriers to local entry will be raised and local competition will suffer.

None of this is necessary. The FCC has the authority and the obligation to mandate that all the rules and interconnection agreement provisions applicable to Section 251(b)(5) traffic apply to ISP-bound traffic. This requirement would ensure cost-

---

[27] Access Charge Reform Order, ¶ 345. The ILECs of course ultimately hope that the Commission will reverse its longstanding policy of treating ISPs as end users. But it is not even worth discussing this issue at any length in this proceeding. As mentioned above, the FCC recently reaffirmed its policy of treating ISPs as end users, and that decision was affirmed. The FCC has a pending proceeding (CC Docket No. 96-263) in which it is addressing all aspects of the ISPs' use of the local network. This is not the proceeding to address those issues.

based rates and would minimize opportunities for the ILECs to slow competition.

II. AT THE VERY LEAST, ISP-BOUND TRAFFIC MUST CONTINUE TO BE PART OF THE SECTION 251-252 INTERCONNECTION AGREEMENT NEGOTIATION AND STATE REVIEW PROCESS.

Assuming arguendo that the Commission does not mandate that the rules applicable to Section 251(b)(5) traffic also apply to ISP-bound traffic, the Commission should at least adopt its tentative conclusion to subject the exchange of ISP-bound traffic to the Section 252 interconnection agreement process. See NPRM, ¶¶ 29-30. Thus, parties should be free to negotiate the rate for the exchange of this traffic as part of the broader interconnection agreement negotiation process. States would of course continue to oversee these negotiations and appeals of state decisions would lie in federal district court.

As a preliminary matter, the Commission is correct that it makes little sense to mandate a specific federal rate for the exchange of ISP-bound traffic. See id., ¶ 29. One rate likely cannot fit all circumstances. This is because there are likely substantial differences in the cost of terminating traffic on different networks in different states. State commissions are already well acquainted with the differences that exist in the local networks over which they have jurisdiction. There is no need for the FCC to duplicate the state commission's work.

Furthermore, some form of federal arbitration process would be costly and in any case unnecessary. Carriers' costs associated with negotiation and arbitration are likely to be much lower if all issues are resolved in the Section 251-252 context.

A federal arbitration process would also likely impose substantial and unnecessary burdens on the FCC's resources. The states have gained substantial experience in overseeing interconnection agreement negotiations and have proven more than competent. There is simply no reason therefore for the FCC to establish a redundant process for the exchange of ISP-bound traffic.

In addition, the creation of a federal arbitration system could well take considerable time. The resolution of disputes related to the exchange of ISP-bound traffic would therefore be delayed. This is an especially serious problem for competitive LECs such as TWTC that are in the process of negotiating the second generation of interconnection agreements. It is critical that TWTC is not forced to delay negotiations (a result ILECs would certainly seek) while the FCC establishes rules implementing its federal arbitration scheme.

In contrast, including the exchange of ISP-bound traffic in broader interconnection agreement negotiations would allow parties to include that issue in ongoing negotiations without missing a beat. It would also allow parties to possibly avoid arbitration altogether by conceding one aspect of interconnection in exchange for agreement on the terms of the exchange of ISP-bound traffic. In this sense, subjecting this issue to the Sections 252-252 framework is consistent with Congress' intent that carriers be given the opportunity to negotiate all aspects of interconnection together in the first instance but be given an opportunity to seek regulatory intervention if agreement cannot be reached. Unfortunately, as with other aspects of interconnection, the ILECs have little incentive to cooperate, thus making state oversight essential.

Finally, the Commission must ensure that states are free in all cases to set rules governing the exchange of ISP-bound traffic in generic rulemaking proceedings. Such proceedings are far more efficient that piecemeal arbitrations as a means for establishing rules. Also, all interested parties have an equal right to participate in rulemakings, which is not always the case in interconnection agreement arbitration proceedings.

III. THE COSTS AND REVENUES ASSOCIATED WITH SERVING ISPS SHOULD CONTINUE TO BE CLASSIFIED AS INTRASTATE FOR SEPARATIONS PURPOSES.

As discussed, there is no basis for altering the treatment of ISPs as end users, and ISPs should be subject to all rules, including those applicable to the exchange of traffic, applicable to other end users. In all events, the exchange of ISP-bound traffic should be subject to the Section 251-252 regime. This means that this proceeding should result in no new federal charges associated with ISP traffic. There is therefore no reason to change the longstanding practice of allocating the costs and revenues associated with carrying ISP-bound traffic to the intrastate jurisdiction for separations purposes.

CONCLUSION

For the reasons described above, the Commission should mandate that the exchange of ISP-bound traffic between LECs be subject to same regulatory rules and interconnection agreement provisions as traffic that is subject to Section 251(b)(5). Even if the FCC does not adopt this approach, the Commission should ensure that the exchange of ISP-bound traffic is part of the Section 251-252 negotiation, arbitration and appeal process. Finally, there is no need to change the practice of allocating ILEC revenues associated with ISP-bound traffic to the intrastate jurisdiction for separations purposes.

Respectfully submitted,

Brian Conboy
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS INC.
d/b/a TIME WARNER TELECOM

April 12, 1999